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INTERPRETATION OF STATUTORY BONDS IN MISSOURI

DAVID R. KOCHERY†

The surety has been called the favorite of the law. It may well be that the individual surety still occupies that preferred status,¹ the basic emolument of which is that the rule of *strictissimi juris* is the controlling guide to judicial interpretations of surety contacts. Where the surety assumes the guise of a corporation, however, his fall from favor is often both abrupt and resounding. This is not surprising inasmuch as the law applied to corporations is seldom commensurate with that applied to individuals. But nowhere is this legal divergence so pronounced as in the law of suretyship.²

All states have statutes requiring that contractors of public construction projects be bonded, as well as most or all public officials. Missouri's basic statute applicable to the bonding of public contractors is found in section 107.170 of the 1949 Missouri Revised Statutes, and its counterparts with regard to public officials appear in sections 107.010 to 107.160 of the same compilation.³ Unlike several states,⁴ Missouri has no remedial

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1. A gratuitous surety is a favorite of the law in Missouri. *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 199 S.W. 1025 (1917) (citing cases); *Prudential Ins. Co. of America v. Goldsmith*, 239 Mo. App. 188, 192 S.W.2d 1 (1945).

2. On the whole, as this article may disclose, the Missouri courts have not been unobjective with sureties. When the particular surety, however, asserts too many technical defenses or legal peccadilloes the court may become downright antagonistic. For example, the court was apparently irritated with the surety in *Henry County v. Salmon*, 201 Mo. 136, 100 S.W. 20 (1907).

3. Section 107.170 provides as follows:

Bond—public works contractor.

It is hereby made the duty of all officials, boards, commissions, commissioners, or agents of the state, or of any county, city, town, township, school, or road district in this state, in making contracts for public work of any kind to be performed for the state, county, town, township, school or road district to require every contractor for such work to execute a bond to the state, county, city, town, township, school or road district, as the case may be, with good and sufficient sureties, and in an amount to be fixed by said officials, boards, commissions, commissioners, or agents, and such bonds, among other conditions, shall be conditioned for the payment of material, lubricants, oil, gasoline, grain, hay, feed, coal and coke, repairs on machinery, groceries and foodstuffs, equipment and tools, consumed or used in connection with the construction of such work, and all insurance premiums, both compensation,

statute providing for the liability of the surety when the terms of its bond do not completely cover the duties of the person bonded. Thus, when an action is brought on such a bond, the following question is presented: Should the bond be enforced according to its terms, or should it be enforced as though it contained the provisions of the statute which required it regardless of its express terms? On the other hand, where the bond covers conditions *in addition* to those provided in the statute, should it be enforced according to the terms of the bond or should it be restricted to the provisions of the statute?

The Supreme Court of New Hampshire has quite recently passed on the questions posed above. In *Petition of Leon Keyser, Inc.*⁵ an action was brought on a contractor's bond by materialmen who had supplied materials to a subcontractor. The bond was required by statute⁶ since it purported to protect a school district engaged in the construction of a public school. The statute provided that the bond should be "conditioned upon

and all other kinds of insurance, on said work, and for all labor performed in such work whether by subcontractor or otherwise. Any amendments to this section since its enactment in 1895 did not affect the portions with which this article is concerned. The amendments, with the dates thereof, may be found in the historical note in MO. ANN. STAT. § 107.170 (Vernon 1952).

The sections cited in the text, *supra*, relating to officials' bonds are pertinent only if there be another law which requires a particular official to provide a bond. Those sections requiring officials to provide bonds are enumerated in MO. ANN. STAT. c. 107, pp. 57-58 (Vernon 1952).

4. ALA. CODE tit. 41, §§ 52-53 (1940); ARIZ. CODE ANN. § 12-315 (1939); CAL. GOV. CODE ANNOTATIONS § 1554 (1951); GA. CODE ANN. § 89-419 (1938); IDAHO CODE ANN. tit. 59, § 817 (1948); IND. ANN. STAT. § 3-2512 (Burns Replacement 1946); IOWA CODE ANN. § 64.5 (1949); MICH. STAT. ANN. §§ 27.848, 27.849 (1938); MISS. CODE ANN. § 4033 (1942); MONT. REV. CODE ANN. § 6-315 (1947); NEV. COMP. LAWS § 4893 (1929); N.Y. PUBLIC OFFICER'S LAW § 11 (1948); N.C. GEN. STAT. § 109-1 (1952); TENN. CODE ANN. § 1836 (Williams 1934); WASH. REV. STAT. ANN. §§ 777, 9933 (1933).

5. 89 A.2d 907 (N.H. 1952).

6. N.H. REV. LAWS c. 264, § 26 (1942):

Whenever a contract for any such public work involves an expenditure of ten thousand dollars, the public authority making the same shall require the contractor to give a bond with sufficient surety, in an amount equal to eighty percent of the contract price, or of the estimated cost of the work if no aggregate price is agreed upon, conditioned upon the payment of all who would have liens under Sec. 25, and providing that suit thereon may be maintained by the lienor against the surety.

Section 25 refers to prior sections giving liens to particular persons, among which is section 15: "If a person shall by himself or others perform labor or furnish materials to the amount of fifteen dollars or more, . . . by virtue of a contract with an agent, contractor or sub-contractor of the owner, he shall have . . . [a] lien. . . ."

the payment of all who would have liens" if the work were private. The plaintiffs, as materialmen, qualified under this statutory provision. By the terms of the bond⁷ the surety undertook to guarantee the "faithful performance of the contract" and to indemnify the school district against loss suffered through the principal's default. Also, the surety promised to pay only those "persons who have contracts *directly* with the principal." [Italics inserted]. Thus, despite a recited purpose to "comply in full" with the statute, the express terms of the bond were narrower than the provisions of the applicable statute, since the statute required complete coverage of ". . . contractors and sub-contractors for all labor performed or furnished, [and] for all equipment hired. . . ."⁸ The court, in awarding recovery to the plaintiff under the bond, stated:

. . . The statute is to be read into the bond for the purpose of affording rights to persons intended by the legislature to be protected, . . . especially when an intent to comply with the statute is evidenced by the bond. . . .⁹

Another provision of the bond permitted the proper parties to file claims with the surety under the bond at any time within two years. The period provided by the New Hampshire statute was ninety days to file, one year to petition.¹⁰ The bond, in this respect, was thus broader than the statute, and the surety reversed his prior contention and now prayed that the statute be read into the bond. But the court again found against the surety and held that, although a claim was tardy under the statute, still the extended time allowed by the bond would be enforced as a common law obligation:

. . . [B]y the weight of authority such a "bond may be conditioned more broadly than the statute requires, and if . . . voluntarily given in consideration of the contract, its extra-statutory provisions may be enforced as a common law obligation." The statute does not prohibit the taking of bonds broader than the statute requires, nor is any intention shown to make the prescribed type of bond exclusive.¹¹

. . . While the statute defines the conditions which a bond

7. Petition of Leon Keyser, Inc., 89 A.2d 917, 920 (N.H. 1952).

8. *Ibid.*

9. *Ibid.*

10. N.H. REV. LAWS c. 264, § 26 (1942) as amended, N.H. Laws 1943, c. 182, N.H. Laws 1949, c. 71.

11. Petition of Leon Keyser, Inc., 89 A.2d 917, 919 (N.H. 1952), citing and quoting 43 AM. JUR. 888, PUBLIC WORKS AND CONTRACTS, § 146.

shall contain, it does not prohibit the incorporation of additional conditions.

... [N]o reason is seen to deprive others of the protection which the parties to the bond intended and provided for, and which the statute does not expressly prohibit.¹²

But the court held that the extended period of time for making claims under the bond applies to benefit only those expressly covered by the terms of the bond since this obligation is enforceable as a matter of the common law of contracts. Those who did not have contracts directly with the principal could not take advantage of this additional condition since their rights depended solely upon the statute.¹³

How would the *Keyser* case have been disposed of in Missouri?¹⁴ It should be noted, in particular, that the provisions of the bond in the *Keyser* case contained both (a) an express invocation of the statute and (b) an express term in direct conflict with the statute, *i.e.*, the provision that the bond covered only those persons having contracts *directly* with the principal.¹⁵

I.

Missouri has traditionally labeled sureties as favorites of the law.¹⁶ On the other hand, since Missouri has a long history of permitting third-party beneficiaries to sue on contracts, the courts have freely allowed laborers and materialmen to sue on construction bonds, with or without a statute, when they are expressly covered by the bond.¹⁷ But when the bond is one

12. *Id.* at 920.

13. *Id.* at 921; *cf.* *Fidelity and Deposit Company of Maryland v. Big Three Welding Equipment Co.*, 249 S.W.2d 183 (Tex. 1952), *reversing* 244 S.W.2d 543 (Tex. Civ. App. 1951). Although the statutory bond contained more liberal procedures for filing claims than the statute, the court refused to enforce the extended provisions of the bond in favor of any of the claimants since all the plaintiffs' claims clearly fell within the provisions of the statute.

14. To review the cases of jurisdictions other than Missouri would be a Herculean task to which the writer does not at present aspire. A great deal of work has been done by the annotators of the American Law Reports. See, for example, Notes, 89 A.L.R. 446 (1934); 77 A.L.R. 21, 126 (1932); 49 A.L.R. 534 (1927); 47 A.L.R. 502 (1927). And, for excellent treatment of the general problem, particular reference is made to Hanna, *Interpretation of Statutory Bonds*, 27 GEO. L.J. 1 (1936).

15. A discussion of the problems of interpretation where the bond contains extrastatutory conditions will be found in Part II, *infra*.

16. See cases cited note 1 *supra*.

17. *School District ex rel. Koken Iron Works v. Livers*, 147 Mo. 580, 49 S.W. 507 (1899); *St. Louis to Use of Glencoe Lime & Cement Co. v. Von*

required by statute, and the bond, unlike the statute, does not in clear terms cover third parties, which consideration will bear the more weight with the Missouri courts—the favoritism to the surety or the avowed purpose and policy of the statute? In a number of the early Missouri cases the decisions required no express opinion as to the effect of the divergence between bond and statute since there apparently was no such divergence or, if there was, it was harmlessly slight. Properly considered they turn out merely to be holdings that on the contracts as executed the surety company had assumed the liability asserted against it. Nevertheless, the courts felt constrained to state generally that when parties execute a statutory bond they are chargeable with notice of all provisions of the statute relating to their obligation, and those provisions are to be read into the bond as its terms and conditions.¹⁸ On the other hand, when the bond did not comply with all the fine minutiae of the statute, and the plaintiff was covered by the terms of the bond anyway, the courts have skirted any discussion of the effect of the statute by holding that the bond is enforceable as a common law obligation and not void.¹⁹

Whereas, in the cases referred to above, the decisions have appeared to be strikingly consistent where the problem did

Phul, 133 Mo. 561 (1896); *St. Louis Public Schools v. Woods*, 77 Mo. 197 (1883); *St. Louis to Use of Contracting & Supply Co. v. Hill-O'Meara Construction Co.*, 175 Mo. App. 555, 158 S.W. 98 (1913); *Devers v. Howard*, 88 Mo. App. 253 (1901).

Whether or not laborers and materialmen can properly be considered third-party beneficiaries under construction bonds is beyond the scope of this article. For an excellent discussion of their general protection, see Campbell, *Protection of Laborers and Materialmen Under Construction Bonds*, 3 U. OF CHI. L. REV. 1-25, 201-228 (1936).

18. *St. Louis ex rel. Sears v. Southern Surety Co.*, 333 Mo. 180, 62 S.W.2d 432 (1933); *State ex rel. Winebrenner v. Fidelity & Surety Co.*, 326 Mo. 684, 32 S.W.2d 572 (1930); *Wright County ex rel. Elk Creek Tp. v. Farmers' & Merchants' Bank*, 30 S.W.2d 32 (Mo. 1930); *Kansas City ex rel. Barlow v. Robinson*, 322 Mo. 1050, 17 S.W.2d 977 (1929); *Albers v. Spencer*, 236 Mo. 608, 139 S.W. 321 (1911); *Kansas City to Use of Kansas City Hydraulic Press Brick Co. v. Youmans*, 213 Mo. 151, 112 S.W. 225 (1908); *Henry County v. Salmon*, 201 Mo. 136, 100 S.W. 20 (1907); *State ex rel. Grimm v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 50 S.W. 321 (1899); *City of Springfield v. Koch*, 228 Mo. App. 511, 72 S.W.2d 191 (1934); *Hughes v. Keith*, 267 S.W. 38 (Mo. App. 1924); *City of St. Louis to Use of Contracting & Supply Co. v. Hill-O'Meara Construction Co.*, 175 Mo. App. 555, 158 S.W. 98 (1913).

19. *State to Use of Hubbard & Moffitt Commission Co. v. Cochrane*, 264 Mo. 581, 175 S.W. 599 (1915); *State ex rel. Jean v. Horn*, 94 Mo. 162, 7 S.W. 116 (1888); *Nations v. Beard*, 216 Mo. App. 33, 267 S.W. 19 (1924); *La Crosse Lumber Co. v. Schwartz*, 163 Mo. App. 659, 147 S.W. 501 (1912).

not require a determination, the decisions have become somewhat less than harmonious when the bond in question has been more glaringly inconsistent with the statute. What has been easy to state by way of dicta has been more difficult to apply in some cases when the merits have been involved. Thus, in an action on an appeal bond required by statute,²⁰ where the bond expressly covered the "prosecution of an appeal with due diligence" only to the Missouri Supreme Court, the court allowed a recovery despite the fact that the appeal could only have gone to the Court of Appeals.²¹ Since the bond statute named no particular court, the inconsistent and restrictive language of the bond was deemed of no effect, the court stating: "All statutory bonds are to be construed as though the law requiring and regulating them was written in them."²²

In *Eau-Claire-St. Louis Lumber Co. v. Banks*,²³ however, another result was forthcoming. A bond had been given by a contractor for the construction of a school building. The bond did not contain the statutory clause protecting labor and materials.²⁴ By its terms the bond merely guaranteed performance by the contractor and promised to keep the school district harmless and indemnified in case of the contractor's failure to perform. In an action by materialmen on the bond it was held that the bond was not a statutory bond, therefore third persons not mentioned in the instrument could not recover. The court related:

. . . [I]n all the cases to which the attention of the court has been directed, it has been held that, to enable third parties not named in the bond or contract to sue on the bond, it

20. MO. REV. STAT. § 809 (1899).

21. *Zellars v. National Surety Co.*, 210 Mo. 86, 108 S.W. 548 (1908). During the operation of the bond the Legislature, by the Laws of 1901, had re-shifted the appellate jurisdiction of the Supreme Court and the Courts of Appeals.

22. *Id.* at 92, 108 S.W. at 549. Where a county sued for a penalty under a dramshop bond required by statute [MO. REV. STAT. § 7196 (1909)] to cover the sale of liquor to habitual drunkards, the court allowed a recovery despite the fact the bond did not encompass the statutory conditions:

It is now well-settled in this state that in construing statutory bonds the general language of the bond must be interpreted in the light by [sic] the statute pertaining to the subject-matter of the bond, that such a statute is to be read into the bond, and that the sureties are held to have contracted with a view to such statute.

Jackson County ex rel. Bryson v. Enright, 198 Mo. App. 527, 531, 201 S.W. 599, 600 (1918).

23. 136 Mo. App. 44, 117 S.W. 611 (1909).

24. MO. REV. STAT. § 107.170 (1949). See note 3 *supra*.

must clearly appear by the terms of the bond or contract, that they are of the class covered by the conditions of the bond. When they are they can sue, whether named in the bond or not; when they are not, they have no right of action on the bond.²⁵

Thus the court ignored the fact that, in all probability, no bond at all would have been given had it not been for the requirement of the statute. The express terms of the bond were controlling. Likewise, the court appears to have ignored the holding²⁶ and language²⁷ of prior Missouri cases. Furthermore, in *Citizens' Trust Co. v. Tindle*,²⁸ the court again refused to expand the express coverage of the bond to comply with the statute. A bank cashier had provided a bond so conditioned that the surety would pay the bank for any damage occasioned by the cashier's "faithfully performing all duties as such cashier of said Pemiscot County Bank." The cashier embezzled money, and the bank sued on the bond. The court denied recovery on the ground that embezzlement was not "faithful" performance as required in the bond. In disposing of the contention that the broad conditions of the statute should be read into the bond the court said:

. . . An attempt . . . to render this a statutory bond by the elimination therefrom or the insertion therein of a word or words which will effect a change in its purpose or meaning and thereby render the sureties liable, is not authorized.²⁹

Such was the state of the decisional law when *Fogarty v. Davis*³⁰ was certified to the Missouri Supreme Court. The *Fogarty* case involved an action by materialmen against the board of directors of a school district for failure to take a contractor's bond conditioned according to section 1040 of the

25. *Eau-Claire-St. Louis Lumber Co. v. Banks*, 136 Mo. App. 44, 53, 117 S.W. 611, 614 (1909). The *Eau-Claire* case was cited as controlling in *State ex rel. Sidenfaden v. U. S. Fidelity & Guaranty Co.*, 193 F.2d 47 (7th Cir. 1951). A bond was provided by the distributees of an estate where the "decedent" was believed dead. Mo. REV. STAT. § 466.150 (1949). A revived "decedent" sued on the bond. Held: the statutory bond is for the benefit of the officer of the probate court distributing the estate. Since plaintiff was not named in the bond, he cannot recover on it.

26. *Zellers v. National Surety Co.*, 210 Mo. 86, 108 S.W. 548 (1908).

27. See note 18 *supra*.

28. 272 Mo. 681, 199 S.W. 1025 (1917).

29. *Id.* at 697, 199 S.W. at 1029; cf. *Board of Education of St. Louis v. U. S. Fidelity & Guaranty Co.*, 155 Mo. App. 109, 118, 119, 134 S.W. 18, 20 (1911).

30. 305 Mo. 288, 264 S.W. 879 (1924). The *Fogarty* case was certified to the Supreme Court by the Springfield Court of Appeals, 240 S.W. 888 (Mo. App. 1922), because of a conflict with a decision of the Kansas City Court of Appeals in *Austin v. Ransdell*, 207 Mo. App. 74, 230 S.W. 334 (1921).

Missouri Revised Statutes of 1919.³¹ If the bond had not complied with the statute the defendants would have been liable for breach of a statutory ministerial duty.³² Plaintiff, believing that the contractor had given bond in compliance with the statute, had installed the plumbing and heating unit for the public school. The bond actually given had provided that the contractor shall perform all his obligations and that the surety shall pay all damages or forfeitures sustained for any reason by the principal's failure to execute his contract. The surety was further obligated to keep the obligee-school district

. . . harmless and indemnified from and against all and every claim, demand, judgment, lien, cost, and fee of every description, . . . and shall repay obligee all sums of money said obligee may pay to other persons on account of work and labor done or materials furnished on or for said contract. . . .³³

The bond was labeled "Statutory Bond," but the wrong printed form was used. Obviously, the terms of the bond did not reiterate the statute³⁴ since there was no mention of laborers and materialmen. It was held that the board of directors was not liable since the bond was a statutory bond and plaintiffs could recover on it in an action against the surety:³⁵

. . . The rule in this State is that, in construing a statutory bond, the provisions of the statutes must be read into it and construed as a part of it. . . . This rule has been said to apply to the statutory provisions . . . with respect to bonds like that in this case. . . . It is obvious the parties were acting under the statute, and it is clear there was no other legal obligation resting upon them which called for a bond of any kind. The cited rule is applicable, and the bond given, when constructed in its light, gives appellants an action upon it.³⁶

Despite the fact that the *Fogarty* opinion ignored prior case law where a contrary holding was on the merits and cited those prior cases where the language was less in point,³⁷ it would

31. Now Mo. REV. STAT. § 107.170 (1949). See note 3 *supra*.

32. *Howard Fire Brick Co. v. Gammon*, 204 S.W. 832 (Mo. App. 1918); *Burton Machinery Co. v. Ruth*, 196 Mo. App. 459, 194 S.W. 526 (1917).

33. *Fogarty v. Davis*, 305 Mo. 288, 292, 264 S.W. 879, 880 (1924).

34. Mo. REV. STAT. § 107.170 (1949).

35. At the suggestion of the court in *Fogarty v. Davis*, 305 Mo. 288, 264 S.W. 879 (1924), the school district subsequently sued the surety on the bond and enjoyed a recovery. *Cabool School District v. U. S. Fidelity & Guaranty Co.*, 9 S.W.2d 103 (Mo. App. 1928).

36. *Fogarty v. Davis*, 305 Mo. 288, 293, 294, 295, 264 S.W. 879, 880, 881 (1924), with citations of some of the cases in note 18 *supra*.

37. See note 18 *supra*.

seem that the case had soundly settled the problem once and for all in Missouri. And, to be sure, it was cited favorably soon thereafter, albeit in dicta.³⁸

However inviolate the *Fogarty* opinion may have seemed at the time, it was soon to be subject to critical attack from no less a source than the United States Court of Appeals for the Eighth Circuit. In *Southern Surety Co. v. United States Cast Iron Pipe & Foundry Co.*³⁹ a materialman sued on a bond made out to the city of King City, as obligee. The plaintiff had supplied pipe and casting to the contractor for which he had never been paid. The contractor had provided a bond which purported to save the city harmless from loss suffered by virtue of the contractor's breach of any covenants in the contract. On its face the bond did not cover the payment of laborers and materialmen, and therefore it did not comply with the terms of the statute.⁴⁰ The opinion does not make it clear whether the court applied federal law or not,⁴¹ but it is plain that the cases cited were Missouri cases, among them *Fogarty v. Davis*. In denying recovery the court distinguished the *Fogarty* case on the grounds that (a) the terms of the bond were different and (b) the bond in the *Fogarty* case plainly indicated that the parties intended to comply with the terms of the statute:

But the *Fogarty* case is clearly distinguishable from the instant case. Here the bond was not conditioned for the performance of the contract, but only to save the city harmless from pecuniary loss resulting from a breach of the contract on the part of the contractor. Manifestly the city could suffer no pecuniary loss due to the failure of the contractor to pay for materials, because there was no obligation on the part of the city to pay for such materials.

. . . [I]n the instant case, there is nothing in the bond to indicate that the parties intended to comply with the provisions of the Missouri statute [MO. REV. STAT. 1040 (1919)], and the bond neither actually nor substantially conformed to the requirements of the statute.⁴²

38. *Metz v. Warrick*, 217 Mo. App. 504, 511, 269 S.W. 626 (1925). The court found that no contract existed between the school district and the contractor so the bond failed for lack of consideration.

39. 13 F.2d 833 (8th Cir. 1926).

40. See note 3 *supra*.

41. "Of course the rights of the parties in this case are to be determined in the light of the law as declared by the federal courts. . . ." *United States v. Starr*, 20 F.2d 803, 805 (4th Cir. 1927) (involving the instant problem).

42. *Phillips, J.*, in *Southern Surety Co. v. United States Cast Iron Pipe & Foundry Co.*, 13 F.2d 833, 836 (8th Cir. 1926).

Although it is true that in the *Fogarty* case the bond indicated an intention to "comply with the provisions of the statute" (the bond was labeled "Statutory Bond"), with deference the remainder of the above distinction cannot be supported. It is submitted that there is no substantial difference between a bond conditioned "for the performance of the contract" (the provision in the *Fogarty* case) and a bond conditioned "to save the city harmless from pecuniary loss resulting from a breach of the contract on the part of the contractor." And if the distinction is to rest on the mere ritual of invoking or not invoking the statute, it is indeed flimsy.

But the courts were not through. The particular terms of the bond in the *Fogarty* case and its invocation of the statute were not the only features of that decision which provided bases for distinctions. The case was also found to be distinguishable because its bond was "ambiguous." This was said to be the case in *St. Joseph v. Pfeiffer Stone Co.*⁴³ Plaintiff sued on the bond to recover the cost of materials furnished a sub-contractor on a public construction project. The bond, by its express terms, permitted a recovery only to those who "had contracts directly with the principal [contractor]." Plaintiff referred the court to the Missouri statute which required a bond in such cases and which stipulated that the bond should be conditioned for the payment of labor and materials "whether by sub-contractor or otherwise."⁴⁴ But the court denied recovery to the plaintiff, holding that where the bond was clear and unambiguous, as in this case, there was no need for interpretation as there was in the *Fogarty* case:

. . . There is nothing in these cases [cited by the plaintiff] holding that a court can interpret plain language of a bond when there is no need for interpretation. In other words these cases do not hold that the courts may construe a bond to mean differently than expressly provided in the bond actually taken.

. . . It has been the policy of the courts of this state, where the bond does not conform to the statute, to treat it as a common law bond and to give it such construction as its terms authorize regardless of the statute.⁴⁵

43. 224 Mo. App. 895, 26 S.W.2d 1018 (1930).

44. See note 3 *supra*.

45. *St. Joseph v. Pfeiffer Stone Co.*, 224 Mo. App. 895, 897, 898, 26 S.W.2d 1018, 1019, 1020 (1930). The cases raised by both parties have been mentioned previously in this article.

In holding that a court will interpret the provisions of a contract only when its language is plainly ambiguous the court in the *St. Joseph* case was probably influenced by the Missouri decisions involving insurance contracts.⁴⁶ In any event, the patent result of the case is that a surety may circumvent the bond statute simply by inserting in his bond express terms limiting or restricting its coverage in a clear and unambiguous manner. Thus the *St. Joseph* case is directly contrary to the holding of the New Hampshire court in the *Keyser* case⁴⁷ in holding that coverage expressly limited to those "having contracts directly with the principal" takes the bond out of the statutory category.

The *St. Joseph* decision started a trend which has not yet been stemmed, much less reversed. In *Portageville v. Fidelity & Casualty Co. of New York*⁴⁸ the city sued on its treasurer's fidelity bond which was required by statute.⁴⁹ The statute broadly required a bond conditioned on the treasurer's turning over all moneys as required by law.⁵⁰ The bond actually given, however, expressly exempted the surety from liability for losses due to the failure of the bank where the city's money was deposited. The bank had failed, and the city had already been awarded a priority in the bank's assets.⁵¹ Whether the court was swayed by its knowledge of that award or not, it denied recovery to the city on the bond. Although the *St. Joseph* case was available as precedent, the court relied on two South Dakota cases which

46. In *Adams v. Metropolitan Life Insurance Co.*, 228 Mo. App. 915, 74 S.W.2d 899 (1934), it was said:

It has been clearly, consistently, and repeatedly held that, where the language of a policy is not ambiguous, but on the contrary is plain and unequivocal, there is no room for construction, and that in such cases the words employed in the policy must be given their usual and plain meaning.

Id. at 921, 74 S.W.2d 903. Cf. *Stalion v. Metropolitan Life Insurance Co.*, 232 Mo. App. 467, 119 S.W.2d 30 (1938).

47. *Petition of Leon Keyser, Inc.*, 89 A.2d 917 (N.H. 1952).

48. 228 Mo. App. 1, 63 S.W.2d 411 (1933).

49. Mo. REV. STAT. § 77.390 (1949) requires cities to demand a bond from the treasurer "conditioned for the faithful performance of his duty, and that he will pay over all moneys belonging to the city as provided by law. . . ."

50. In *Bragg City Special Road District v. Johnson*, 323 Mo. 990, 20 S.W.2d 22 (1929) it had been held that the treasurer of a road district is an insurer of all district funds in his possession, whether in a bank deposit or otherwise.

51. *Portageville v. Harrison*, 228 Mo. App. 27, 63 S.W.2d 410 (1933).

were exactly in point.⁵² In one of them language was used which must have met with the approval of the Missouri court:

... There is neither doubt nor ambiguity. The language of the bond affirmatively exempts the surety from a certain peril for which the statute contemplated that the surety on the statutory bond should be answerable. The officer did not comply with the law when he tendered such a bond, nor did the approving body when they accepted it. Nevertheless, it was tendered and approved. There is here no room for presumption in any proper sense of the word. To "presume" that the surety intended its obligation to be coextensive with the contemplation of the statute would be flying squarely in the face of the facts. The surety has very plainly, definitely, and positively said that it did not so intend. The situation then is one where the plain terms of the contract impose a limitation upon liability, which limitation the statute did not contemplate.⁵³

No Missouri cases were cited. But the court plainly rested its decision on a mixture of the idea of unambiguity of the *St. Joseph* case plus the idea of failure to invoke the statute of the *Southern Surety* case. The reference to the parties' "intention" clearly would seem to contemplate some sort of invocation of the statute.⁵⁴

*City of Sedalia v. American Surety Co.*⁵⁵ again involved an action by the city on the fidelity bond of its city collector. The bond was required by an ordinance pursuant to the statute which required that the bond be "conditioned for faithful performance of his duty, and that he will pay over all moneys belonging to the city as provided by law."⁵⁶ The bond, however, was conditioned on losses sustained through the collector's "Fraud, Dishonesty, Forgery, Theft, Embezzlement, Wrongful Abstraction

52. *Murdo Township v. Townsend*, 56 S.D. 576, 229 N.W. 935 (1930); *Thunder Hawk School District v. Western Surety Co.*, 58 S.D. 312, 235 N.W. 921 (1931).

53. *Id.* at 318, 235 N.W. at 923.

54. In an action on a bond identical to that in *Portageville v. Harrison*, 228 Mo. App. 27, 63 S.W.2d 410 (1933), the Court of Appeals allowed a recovery, despite the fact that the plaintiff's loss was due to a bank failure, on the ground that the evidence was clear that the parties really did not intend that the clause limiting the surety's liability was to be of any force or effect. However, the Supreme Court quashed the record of the Court of Appeals since that court was found to have deviated from the record of trial court and had decided the case in equity when it was presented and tried as an action at law. *State ex rel. Fidelity & Deposit Co. v. Allen*, 85 S.W.2d 455 (Mo. 1935), *quashing the record in* *Naylor Special Road District v. Fidelity & Deposit Co.*, 75 S.W.2d 436 (Mo. App. 1934).

55. 82 F.2d 112 (8th Cir. 1936).

56. Mo. REV. STAT. § 77.390 (1949).

or Wilful Misapplication." The Eight Circuit held that since the city's loss was due to the failure of the depository bank and not to the collector's "Fraud, Dishonesty, [etc.]" there could be no recovery on the bond. The court relied on the *St. Joseph* and *Citizens' Trust* cases⁵⁷ and refused to read the provisions of the statute into the bond. The court quoted approvingly from the *Citizens' Trust* case as follows:

... The condition precedent necessary to the application of this rule [the *Fogarty* rule] is ambiguity . . . An instrument which speaks unmistakably in its own words leaves no room for construction. . . . An attempt, . . . to render this a statutory bond by the elimination therefrom or the insertion therein of a word or words which will effect a change in its purpose or meaning, and thereby render the sureties liable, is not authorized.⁵⁸

The rule of the foregoing cases, from *Southern Surety* to *City of Sedalia*, is apparently still extant in Missouri. They hold that, before a statutory bond will be interpreted to coincide with the statute, the following must be present in any given case: (a) the terms of the bond must be like those in the *Fogarty* bond, or, at least, (b) the language of the bond must be "ambiguous," and (c) the terms of the bond must indicate that the parties intended that the bond was to be considered a statutory bond.

The aforementioned elements were present and the *Fogarty* doctrine was successfully pleaded in *Camdenton Consolidated School District v. New York Casualty Co.*⁵⁹ A contract was given for the construction of a school, and the contractor furnished bond.⁶⁰ The bond did not recite the statutory conditions but was almost identical with the *Fogarty* bond, except that it was not labeled "Statutory Bond" as in the *Fogarty* case. It was conditioned on "the faithful performance of the contract and the payment of obligations arising thereunder."⁶¹ Actually, the bond was in that form which exists between a contractor and a private individual, and merely purported to indemnify

57. *St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co.*, 224 Mo. App. 895, 26 S.W.2d 1018 (1930); *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 199 S.W. 1025 (1917).

58. 32 F.2d 112, 114 (1936), quoting from the case of *Citizens' Trust Co. v. Tindle*, 272 Mo. 681, 696, 199 S.W. 1025, 1028 (1917).

59. 340 Mo. 1070, 104 S.W.2d 319 (1937).

60. The statute is set out in full in note 3 *supra*.

61. *Camdenton Consolidated School District ex rel. Powell Lumber Co. v. New York Casualty Co.*, 340 Mo. 1070, 1074, 104 S.W.2d 319, 322 (1937).

the obligee-school district if the contractor did not perform. Plaintiff was a materialman who had furnished lumber for the building. In permitting recovery the court relied heavily on favorable decisions from other jurisdictions,⁶² and, incidentally, on the *Fogarty* case. The *Southern Surety* case⁶³ was disposed of by a short sentence which implied that it might have been decided differently.⁶⁴ At any rate, from all the circumstances, the court stated that "... it is evident [that the bond] was intended by all the parties to perform the office of the bond required by the statute. . . ."⁶⁵ Why the intention of the parties was so "evident" was not made clear by the court. Indeed, on the surface, their intention would seem to have been quite otherwise since they used an ordinary private bond instead of the statutory form. The court did not bother to distinguish prior cases of the *St. Joseph* stripe. The case not only permitted recovery by the materialman, but also by a creditor who had loaned money to the contractor to enable the latter to meet his payrolls, since this was deemed to come within the "labor" coverage of the statute.⁶⁶

62. West Virginia, Wisconsin, Mississippi, Arkansas and Nebraska. *Id.* at 1080-1082, 104 S.W.2d at 323-325.

63. *Southern Surety Co. v. United States Cast Iron Pipe & Foundry Co.*, 13 F.2d 833 (8th Cir. 1926).

64. "Under the facts in the *Fogarty* case the reasoning of the Circuit Court of Appeals and its conclusion might well and soundly have been made the basis of the decision therein." *Camdenton Consolidated School District ex rel. Powell Lumber Co. v. New York Casualty Co.*, 340 Mo. 1070, 1084, 104 S.W.2d 319, 326 (1937).

65. *Id.* at 1078, 104 S.W.2d at 323. The court, however backhandedly suggested that the doctrine of the *St. Joseph* case was still good law in Missouri:

We have, however, followed one line of conflicting authority and held that without regard to the form or wording (*the obligation of the statute not being expressly excluded*), when a bond is given under the circumstances and in the situation shown in this case the statutory condition will be read into it and the surety be held by virtue of the statute. . . . [italics inserted].

Id. at 1093, 104 S.W.2d at 332.

66. *Cf. Audrain County ex rel. First National Bank v. Walker*, 236 Mo. App. 627, 155 S.W.2d 251 (1941) in which a creditor of the contractor sued on the bond for money loaned to pay for labor, materials, etc. There the court said:

. . . it would seem that it is amply clear that a person or bank furnishing money or funds to a building contractor with which for him to perform . . . was not within the contemplation of the Legislature as shown by the statutory provisions, and, consequently, was not within the contemplations of the parties to this action, as shown by the bond which contained the statutory wording and followed the language of such statute.

Id. at 636, 155 S.W.2d at 255. Despite this reference it is urged that this

The doctrine of the *Camdenton* and *Fogarty* cases was followed in *State ex rel. Jefferson County v. Sheible*.⁶⁷ The county sued on its treasurer's official bond for money which was alleged to have been wrongfully retained from the county. A county treasurer must provide two bonds under the statutes.⁶⁸ In the instant case the treasurer gave but one bond with twenty-nine individual sureties. The bond was entitled "Official Bond." Its terms were unusually vague⁶⁹ and defendants (the sureties) claimed it was merely a promise to give two bonds sometime in the future. The court awarded recovery to the county:

... A literal reading of its condition would leave this impression [that it was merely a promise to give two bonds]. However a bond to give a bond is neither known nor contemplated by the statutes relating to the bonds to be given by a treasurer.

... It is needless for us to comment on the awkwardness in drafting the terms. Nevertheless, an intention to comply with the requirements of the statute is apparent. ... The intention is further indicated by reference to "Rev. Stat. 6767." True, this section must refer to the Statutes of 1899 but in view of the circumstances even this discrepancy in time is not surprising. This section is identical with the present section ... requiring the faithful performance bond.⁷⁰

In addition to relying on the *Fogarty* and *Camdenton* cases the court also relied on two other more recent Missouri cases: *State v. Wipke*⁷¹ and *State v. Vienup*.⁷² Both these cases involved

article is directed only to the question of interpretation of bonds and is not directly concerned with the interpretation of the statutes.

67. 163 S.W.2d 559 (Mo. 1942).

68. Mo. REV. STAT. §§ 10400, 13795 (1939). The provisions are substantially the same as §§54.070 and 54.160 of the 1949 Missouri Revised Statutes.

69. The bond provided:

The condition of the above bond is such, however, that whereas, the said Frank D. Sheible was, on the eighth day of November, 1932, duly (1) elected to the office of (3) Treasurer of the County of Jefferson in the State of Missouri and has been duly commissioned. Now, therefore, if the said Frank D. Sheible shall (2) give bond to the county "for the faithful performance of the duties of his office." Rev. Stat. 6767. Also, give bond to the State of Missouri "for the faithful disbursement, according to law, of all such moneys as shall from time to time come into his hands."—then this obligation to be void, otherwise to remain in full force and effect.

State ex rel. Jefferson County v. Sheible, 163 S.W.2d 559, 560 (Mo. 1942).

70. *Ibid.*

71. 345 Mo. 283, 133 S.W.2d 345 (1939).

72. 347 Mo. 382, 147 S.W.2d 627 (1941).

an interpretation of section 19 of the Liquor Control Act of 1933 as amended⁷³ and whether any bond required by that act could be sued on for breach for the full amount thereof without a showing of actual damage to the state:

... The sole question involved is whether or not the State may recover the full penalty of the bond without proving that it was damaged as a result of the principal's breach of the bond.⁷⁴

The question for our determination therefore is this: Is the bond sued upon one of forfeiture or one of indemnity?⁷⁵ Since the sole question in each case was the interpretation of the statute, and since there was no dispute that the bond was intended to be a statutory bond, the following language in the *Vienup* case, though sound, was not necessary to the result:

... Under the well-settled rule in this State, any required provisions of the condition of the bond found in the statute but omitted from the instrument itself must be read into it, and, conversely, terms which are found in the condition of the bond but not in the statute are to be disregarded.⁷⁶

Thus neither the *Sheible*, *Wipke*, nor *Vienup* case affects any prior decisional doctrine.

Briefly, then, where the coverage of a statutory bond is more restricted than the provisions of the applicable statute, the existing state of the law in Missouri seems to be as follows: Before the conditions of the statute will be read into the bond the parties must have intended that it be a statutory bond and this intention may be presumed from the surrounding circumstances. If the bond is ambiguous this presumption may arise, and the courts will be prone to interpret the bond in accordance with the provisions of the statute. However, where the language of the bond is clear, the parties will be deemed conclusively to intend what the bond stipulates, and the coverage of the bond as written will not be enlarged. The language of the bonds in the *Fogarty*, *Camdenton*, and *Sheible* cases seems to provide the requisite ambiguity.

II.

As stated previously,⁷⁷ the New Hampshire Supreme Court held that those provisions of a bond which are *additional* to

73. Mo. Laws Ex. Sess. 1933-1934, p. 77.

74. *State v. Wipke*, 345 Mo. 283 288, 133 S.W.2d 354, 355 (1939).

75. *State v. Vienup*, 347 Mo. 382, 386, 147 S.W.2d 627, 628 (1941).

76. *Ibid.*

77. Text supported by footnotes 11 - 13 *supra*.

the requirements of the statute will be enforced as common law obligations. But they will be enforced only as to those parties actually contemplated in the bond's express coverage, not as to those whose claims depended solely upon the statute.⁷⁸ Thus a variation of the aforementioned issue arises, *viz.*, the surety bond contains clauses and offers protection in addition to, rather than restrictive of, that stipulated by the statute. It may be that the official has complied with the obligations of that part of the bond which complies with the statute but has committed some other dereliction of duty which, in fact, is expressly covered by the terms of the bond actually issued. If the obligations of the surety are supported by a valid consideration, there is no reason why the additional obligations should not be enforced. How would a Missouri court handle the case?

*State to Use of Hubbard & Moffitt Commission Co. v. Cochran*⁷⁹ involved an action on a warehouseman's bond required by statute. The bond afforded more protection to the obligee than the statute required. There was some discussion as to whether the applicable statute had not been declared unconstitutional along with some general statutes relating to the inspection of warehouses. The court inferred that the statute was still valid, but whether it was or not, the bond was enforceable as a common law obligation with respect to the extrastatutory provisions:

... [T]he fact that the bond in question embodied conditions to comply with the statutory regulations does not prevent the enforcement of other obligations expressed which, though not prescribed by the statute, were the common law duties attached to the business of public warehousemen.⁸⁰

This result is consistent with many Missouri cases holding that, regardless of a statute, a bond will be enforced as a common law obligation in accordance with its express terms.⁸¹ This is particularly true where, as here, the party suing is clearly covered by the terms of the bond anyway. Cases like the *Cochrane* case are to be distinguished from cases like the *St. Joseph* case⁸² in that here there was a plain intention to comply

78. *Petition of Leon Keyser, Inc.*, 89 A.2d 917, 921 (N.H. 1952).

79. 264 Mo. 581, 175 S.W. 599 (1915).

80. *Id.* at 593, 175 S.W. at 602.

81. See note 19 *supra*.

82. *St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co.*, 224 Mo. App. 895, 26 S.W.2d 1018 (1930).

with the statute albeit additional protection was voluntarily included in the bond.

In *School Consolidated District v. Wilson*⁸³ a school district brought an action on a bond provided by its depositary bank. The bank had not complied with the applicable statutes⁸⁴ and thus had not qualified as a depositary of public funds. The bond issued by the surety covered ". . . all funds of said District, including funds belonging to said District. . . ."⁸⁵ The bank failed, and the school district sued on the bond. The surety claimed that, since the bank was unqualified, there was never a debtor-creditor relationship created as contemplated by the parties and the bond was void for lack of consideration. It was decided that, if the sureties had given merely a statutory bond, they would not have been liable for the illegal deposit but that the terms of the bond, broader than the statute required, included the risks resulting from a deposit in an unqualified depositary.

This decision would seem to follow the result in the *Cochrane* case. However, it must be noted that this court pointed out that the record did not disclose any compliance or attempt to comply with the statute.⁸⁶ Such was not the situation in the *Cochrane* case. It would seem, however, that the circumstances of the giving of the bond would raise a presumption that the parties intended to comply with the statute.⁸⁷ Thus, at least with respect to the lack of an intention to abide by the statute, this case compares favorably with the *St. Joseph* and *Portageville* cases⁸⁸ which also held the bonds non-statutory and enforceable as common law obligations. But, to the surety, the differences are far more important than the similarities; in one he wins, in the other he loses. On the basis of this case it would seem that, if, as here, the language of the bond is clear, the courts in Missouri will not interpret the bond so as to *diminish*

83. 345 Mo. 598, 135 S.W.2d 349 (1939); 26 WASH. U.L.Q. 127 (1941).

84. MO. REV. STAT. §§ 9362, 12184-12198 (1929).

85. *School Consolidated District v. Wilson*, 345 Mo. 598, 603, 135 S.W.2d 349, 351 (1935).

86. *Ibid.*

87. *Camdenton Consolidated School District ex rel. Powell Lumber Co. v. New York Casualty Co.*, 340 Mo. 1070, 104 S.W.2d 319 (1937).

88. *Portageville v. Fidelity & Casualty Co. of New York*, 228 Mo. App. 1, 63 S.W.2d 411 (1933); *St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co.*, 224 Mo. App. 895, 26 S.W.2d 1018 (1930).

its coverage. As stated previously, neither will the courts interpret such a bond so as to *enlarge* its coverage.

But any clarity in this particular area has been severely tested by the decision in *State ex rel. Sanders v. Hartford Accident & Indemnity Co.*⁸⁹ A customer brought an action on a broker's bond, the bond having been required by statute.⁹⁰ The bond, according to the statute, was to be conditioned on the broker's performing in accordance with the provisions and requirements of the Missouri Securities Act.⁹¹ The broker had sold plaintiff's stock at plaintiff's request but had failed to return the money to the plaintiff. Instead, without awaiting plaintiff's instructions, he had used that money to buy and sell more stock for the plaintiff, by virtue of which plaintiff suffered loss. The broker's bond, instead of merely reiterating the provisions of the statute, contained additional protection, *viz.*, that the broker "must properly account for all moneys or securities received from or belonging to" the plaintiff. Such a provision was not one of the brokers' requirements found in the Missouri Securities Act. Although the terms of the bond were plainly unambiguous, the court refused recovery to the plaintiff, holding that since the provisions exceeded the terms of a bond required by statute, this particular provision is unenforceable. The opinion does not mention the case of *School Consolidated District v. Wilson* but relies on the *Fogarty* and *Camdenton* cases.⁹² While those cases held that the provisions of the statute may be read into the bond, they required a condition precedent to such interpretation—"ambiguity." This requirement was established by the *St. Joseph* case,⁹³ among others. But this court purports to distinguish the *St. Joseph* case by raising an *ultra vires* question:

... We conclude that the case at bar is distinguished from the above cases in that the executing agency herein is a creature of the statutes with no power to exact beyond the limitations prescribed by the statute.⁹⁴

89. 235 Mo. App. 729, 143 S.W.2d 483 (1940).

90. Mo. REV. STAT. § 7744 (1929).

91. Mo. REV. STAT. §§ 7724-7757 (1929).

92. *Camdenton Consolidated School District ex rel. Powell Lumber Co. v. New York Casualty Co.*, 340 Mo. 1070, 104 S.W.2d 319 (1937); *Fogarty v. Davis*, 305 Mo. 288, 264 S.W. 879 (1924).

93. *St. Joseph ex rel. Consolidated Stone Co. v. Pfeiffer Stone Co.*, 224 Mo. App. 895, 26 S.W.2d 1018 (1930).

94. *State ex rel. Sanders v. Hartford Accident & Indemnity Co.*, 235 Mo. App. 729, 735, 143 S.W.2d 483, 485 (1940).

By "executing agency" the court was referring to the official whose duty it is to exact and approve statutory bonds. In this case the "executing agency" was the Secretary of State whereas in the *St. Joseph* case it was a city official. To say that they are materially different because the Secretary of State "is a creature of the statutes with no power to exact beyond the limitations prescribed by the statute" seems not only to be erroneous but also to be a frivolous application of the *ultra vires* doctrine where it was not necessary. To read "limitations" into the statute in this sense is to re-draft the statute for no perceptibly useful purpose.⁹⁵ The court made no mention of the lack of ambiguity in this bond. In short, the distinction seems without merit.

The *Sanders* case might be isolated because of the unfortunate *ultra vires* ingredient were it not for another factor: the decision relies on an Iowa case as controlling. In *United States Fidelity & Guaranty Co. v. Iowa Telephone Co.*⁹⁶ a contractor was hired to construct telephone wires for the city. The contractor provided a bond as required by an ordinance, but whereas the ordinance required only that the bond cover the restoration of streets and alleys, the bond actually given also covered maintenance of the telephone poles and wires after completion. In an action on the bond for failure to maintain the installations the Iowa court denied recovery. A bond which failed to comply with a statute or ordinance would be enforced as a common law obligation, but not so a bond which, as here, contained additional clauses:

And it would be an anomalous holding to say that a bond may be enforced as a statutory obligation and also as an obligation at common law. . . .⁹⁷

Since the *Sanders* case quoted this statement with approval,⁹⁸ the decision is in conflict with prior cases discussed above. In passing, it should be noted that Iowa has a remedial statute⁹⁹ which provides that bonds given pursuant to statutes will always be interpreted as though they contained the statutory conditions.

95. The New Hampshire court found no such limitations in *Petition of Leon Keyser, Inc.*, 89 A.2d 917 (N.H. 1952).

96. 174 Iowa 476, 156 N.W. 727 (1916).

97. *Id.* at 495, 156 N.W. at 733.

98. *State ex rel. Sanders v. Hartford Accident & Indemnity Co.*, 235 Mo. App. 729, 736, 143 S.W.2d 483, 485 (1940).

99. IOWA CODE ANN. § 64.5 (1949).

Missouri has no such statute. It may well be that the Iowa statute influenced the decision in that case and that the reliance on it in the *Sanders* decision may have been ill-advised.

In summary, it seems to be obvious that the present Missouri law in this area leaves something to be desired. It is certainly difficult to reconcile the *Sanders* opinion with the decisions of the Missouri Supreme Court in the *Cochrane* case and in *School Consolidated District v. Wilson*. The bonds in all three cases clearly and unambiguously created a coverage which was broader than the applicable statute required. In none of the statutes which were involved was there any provision prohibiting the giving of bonds containing protection in addition to that stipulated by statute. As a matter of the interpretation and enforcement of contracts, if for no other reason, it would seem that the additional clauses should be enforceable against the surety. The *Sanders* case disagrees.

III.

Any review of the Missouri cases on interpretation of statutory bonds seems to point up at least one underlying question: What inferences, if any, should be drawn from the fact that a corporation, for a compensation, and with knowledge of a pertinent statute, has undertaken to guarantee that some official or public contractor will perform his statutory duties? Whatever the inferences, leaving their determination solely to the courts would seem to have worked out somewhat less than satisfactorily in Missouri. This applies whether the bond in question contained coverage restrictive of the statute or whether the surety had voluntarily gone beyond the statutory requirements. To be sure, rough patterns may be drawn from case to case, but too often they rest on grounds which are highly tenuous, at best. The result is that too few reasonable expectations as to liability have been evolved from the case law. The orderly development of the law is evidenced most eloquently when contracting parties are permitted to realize their reasonable expectations.

It is submitted that Missouri could well use a remedial statute which would be a guide to the courts in interpreting and enforcing any particular statutory bond. Of course, a remedial statute which merely provided that a statutory bond, though defective, would not be void would be useless in Missouri. Such is

already accepted law.¹⁰⁰ And a remedial statute whose language is obscured either because of awkward draftsmanship or the insertion of compromise clauses would give rise to more litigation than it would avoid. A statute like that of Iowa, on the other hand, might put to rest much conflicting precedent:

All bonds required by law shall be construed as impliedly containing the conditions required by statute, anything in the terms of said bonds to the contrary notwithstanding.¹⁰¹

Although such a statute would tend to settle the question where the bond was more restricted than the statute, it might not reach the situation where the conditions of the bond go beyond the requirements of the statute. Since the case law is unharmonious in this field a Missouri statute might very well contain the additional words "at least" so that it would read as follows:

All bonds required by law shall be construed as *at least* impliedly containing the conditions required by statute, anything in the terms of said bonds to the contrary notwithstanding.

There is little doubt any longer that the modern surety has surrendered his former favored status in the courts. This does not mean, however, that he should be treated any more harshly than any other compensated insurer, if indeed he has been. There would seem to be no serious objection to holding him to his full liability under his contracts as executed, or his contracts which a statute has plainly said he should have executed before accepting a premium.

100. *State to Use of Hubbard & Moffitt Commission Co. v. Cochrane*, 264 Mo. 581, 175 S.W. 599 (1915); *State ex rel. Jean v. Horn*, 94 Mo. 162, 7 S.W. 116 (1888); *Portageville v. Fidelity & Casualty Co. of New York*, 228 Mo. App. 1, 63 S.W.2d 411 (1933); *St. Joseph ex rel. Consolidated Stone Co., v. Pfeiffer Stone Co.*, 224 Mo. App. 895, 26 S.W.2d 1018 (1930); *Nations v. Beard*, 216 Mo. App. 33, 267 S.W. 19 (1924); *La Crosse Lumber Co. v. Schwartz*, 163 Mo. App. 659, 147 S.W. 501 (1912).

101. IOWA CODE ANN. § 64.5 (1949).

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